

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Developing a Unified Intercarrier)	CC Docket No. 01-92
Compensation Regime)	
)	

**REPLY COMMENTS OF
THE PENNSYLVANIA PUBLIC UTILITY COMMISSION**

The Pennsylvania Public Utility Commission (PaPUC) submits these Reply Comments to the Federal Communications Commission (FCC) in response to the FCC Notice on Developing a Unified Intercarrier Compensation Regime (ICC NOPR) issued March 3, 2005.¹

A. Summary of the PaPUC Reply Comments.

The PaPUC Reply Comments address complex issues of law and policy contained in the Comments and the ICC NOPR. The PaPUC agrees with the FCC and other Comments on the need for intercarrier compensation reform. The PaPUC suggests that the FCC consider an approach that does not preempt the states but, rather, provides states with the choice to opt-in to a federal solution. The PaPUC agrees with the NARUC Comments and disagrees with other Comments urging preemption as a matter of law or

¹The PaPUC Reply Comments should not be construed as binding on the PaPUC in any matter pending or hereafter arising before the PaPUC. The views expressed here may change in response to subsequent events including legal or regulatory developments at the federal or state level.

policy. TA-96 does not appear to give the FCC the authority to impose federal mandates on intrastate access regimes in the name of compensation reform under a mixed use doctrine or a conclusion that states are unwilling or unable to undertake reciprocal compensation reform. Preemption is likely to spark litigation by disaffected parties.

The PaPUC urges the FCC to give serious consideration to adopting a unified compensation model that should be mandatory at the interstate level but voluntary at the state level. The FCC should develop a compensation model that reflects the declining importance of distance and capacity on modern networks. The PaPUC suggests that the FCC consider a result which abandons the current Minutes of Use (MOU) structure and the distance and capacity constraint assumptions reflected in that structure.

The PaPUC suggests that the FCC consider adoption of a unitary compensation structure with a flat rate/unlimited usage component. These features better reflect modern network realities compared to a reformed MOU structure. A reformed MOU structure seems to perpetuate the distance and capacity constraints of the older analog/circuit-switched network.

The PaPUC also urges the FCC consider retention of the current federal fund which supports universal service. The PaPUC suggests that the parties and the FCC properly concluded that, while the components and methods of continuing the current federal fund might change, this longstanding federal fund is necessary.

The PaPUC takes no position on the “one POI per LATA” compensation issue due to a proceeding underway in Pennsylvania.² The PaPUC does suggest, however, that the FCC consider the “transit service” and “special access” issues.

The PaPUC suggests preservation of the status quo for these services pending completion of intercarrier compensation reform. If, however, the FCC addresses these issues, the PaPUC suggests that the FCC consider classifying these services as tariffed common carrier services subject to default federal rules including an opt-in provision for other carriers given industry’s apparent reliance on these services. The PaPUC suggests this option because it could address concerns about market power for these services and the potential for the reintegration of facilities and services following the *Brand X* case. .

Finally, the PaPUC suggests that any federal solution to this interstate problem be re-evaluated on a 5-year basis. The state commissions and carriers which decide to opt-in to any federal solution should conduct be empowered to conduct the initial examination and certification of need for support from the longstanding federal fund.

B. Preliminary Observations. The PaPUC agrees with the FCC that the current intercarrier compensation consists of three elements. First, access charges for long distance calls are based on embedded average costs. Second, reciprocal compensation for local calls is based on forward-looking economic costs. Finally, access charges are not imposed on Internet Service Providers (ISPs) although ISPs pay local business rates.

²Generic Investigation in re: Impact on Local Calling Carrier Compensation if a Competitive Local Exchange Carrier Defines Local Calling Areas Differently Than the Incumbent Local Exchange Carrier’s Local Calling Area but consistent with Established Commission Precedent, I-00030096 .

The PaPUC recognizes that this compensation structure was created before the Internet, deployment of IP-enabled services like VoIP, wireless communications, and the convergence of voice, data, and video services. The PaPUC also recognizes that this compensation structure reflects the economic cost of shifting the nation's telecommunications paradigm from monopoly to competition after divestiture in 1984.

Some Comments support compensation reform with a new MOU rate and only a few suggest a flat rate/unlimited usage approach. The problem with a reformed MOU rate structure, either lower or blended, is that it could reflect average embedded access charges and average reciprocal compensation charges. Others suggest that MOU rates apply to the Internet although the potential for rate shock warrants a very considered approach to this issue. The PaPUC suggests that the MOU suggestions set forth above and in the Comments seem to perpetuate the outmoded distance and capacity assumptions of traditional networks. For these reasons, the PaPUC urges the FCC to consider an alternative unitary compensation structure with a flat fee/unlimited usage component. The PaPUC makes this suggestion because the distance and capacity assumptions reflected in the reformed MOU proposals do not reflect the declining importance of distance and capacity on networks that now transmit bits and bytes at the speed of light.

The PaPUC recognizes the considerable divergence on the relative appeal of SLCs or interstate assessments on special access to continue current federal support. The Rural Alliance Comment imposes the smallest demand on a federal fund or end-user surcharges although that is attained by preserving the MOU structure. The CTIA-Wireless and Nextel Comments propose a Bill and Keep solution although that may harm smaller rural carriers that rely on access revenues and universal service to maintain

affordable rates in thinly populated areas. The ICF Comment seems to prefer end-user surcharges because of their service areas.

The PaPUC suggests that the wholesale adoption of any one proposal or Comment could provoke litigation. The PaPUC urges the FCC to seriously consider a hybrid compensation structure that blends the best features of each of the proposals and Comments.

The PaPUC suggests that the FCC consider adopting a hybrid compensation model. This approach could also avoid major litigation by not preempting the states. A hybrid solution could also mitigate compensation disputes between wireline and wireless competitors and incumbents. A hybrid solution might also recognize the continuing migration of traditional voice service to wireless and IP platforms, the ILECs' deployment of IP platforms (PSTN2) to replace the traditional analog/circuit switched PSTN network, and rate and service disparities between urban and rural carriers.

Finally, a hybrid solution could provide carriers with an opportunity to transition from the current access/reciprocal MOU compensation structure to a unitary compensation structure. A unitary compensation structure with a flat rate/unlimited usage component may better reflect the characteristics of modern networks than any reformed MOU solution that seems to perpetuate outmoded distance and capacity assumptions.

For these reasons, the PaPUC urges the FCC to consider an approach that allows the states to decide whether to voluntarily participate in a federal solution. Any federal solution should provide carriers with an opportunity to recover federal rates for flat rate/unlimited federal services. The FCC's approach should incorporate offsets to any alleged revenue need from revenues that come from SLC increases, rate rebalancing in the states, revenue neutral rate recovery provisions in state laws, and do so by

evaluating the combined rate impact of current state and future federal compensation reform.

The PaPUC suggests this holistic approach because it emphasizes interconnection, technology convergence, urban-rural comparability, and affordability. The PaPUC suggests that an optimal solution under this holistic approach could be a flat fee/unlimited usage structure accompanied by minimal SLCs.

C. Extended Discussion.

1. **Legal Authority.** The PaPUC suggests that Section 251(b)(5) of TA-96 controls reciprocal compensation for local calls while Section 252(d)(2) authorizes the states, not the FCC, to set charges for transport and termination charges. This shared authority must be reconciled with the Section 254(f) and 254(i) provisions regarding universal service. TA-96 seems to embrace joint, not exclusive federal, obligations regarding access charges and local calling in order to ensure that universal service is available at rates that are just, reasonable and affordable. Preemption of state authority under Section 253(d) for purposes of Sections 251(b)(5) and 252(d)(2), even if exercised for Section 254 purposes, may not constitute a valid use of the mixed use doctrine. Moreover, the NARUC Comment sets forth an extensive legal analysis strongly indicating that the FCC may not preempt the states. In addition, the provisions set forth above require the FCC to identify and demonstrate what state or local action, as opposed to desirable federal policy goal, warrants preemption. The fact that the nation's federalist structure of concurrent legal authority may be inefficient at times is no legal basis for obviating that law to address a considerable policy need. Also, forbearance under Section 401 cannot undermine the joint authority of

the FCC and the states to encourage the deployment of advanced telecommunications under Section 706.

For all these reasons, the PaPUC urges the FCC carefully consider adoption of a unified federal compensation reform that is mandatory at the interstate level but voluntary at the state level. The FCC should consider a unified rate structure that is so attractive to the states and its carriers that states and carriers voluntarily opt-in to the federal solution. A voluntary opt-in, as opposed to a preemptory shut out, encourages the states and its carriers to reform intrastate access rates, preserve universal service, and assist in deployment of modern networks. Importantly, the approach avoids litigation over preemption and forbearance. Since the TA-96 seems to allocate authority to the states as well as the FCC, the FCC should consider a reform solution that encourages participation, discourages litigation, and adjustments to modern network realities.

2. Incorporation of State Carrier Compensation and Network Deployment Reforms. The PaPUC urges the FCC to consider a solution that also reflects the rate impacts attributable to state reform given the significant state efforts at implementing compensation reform for network modernization purposes.

Pennsylvania modified its Chapter 30 law. Act 183 of 2004, P.L. 1398. The modified Chapter 30, set forth at 66 Pa.C.S. §§3011-3019, provides carriers with an opportunity to substantially reduce their productivity offsets and thereby secure the compensation needed to fund network modernization. The law also contains revenue neutrality provisions applicable to revenue changes stemming from access charge reform. 66 Pa.C.S. § 3017(a).

The combination of productivity offset reductions, revenue neutrality, and network modernization components provide stark evidence of the states'

ability to implement compensation and structural reform. These efforts undermine the view that preemption of the states is needed because states are unable or unwilling to address intercarrier compensation reform.

The FCC should consider a result that reflects, by incorporation, ongoing or completed compensation reforms at the state level. This may be necessary to avoid disparate treatment of states which have either completed or are currently undertaking intercarrier compensation reform compared to states which have not undertaken similar efforts before the FCC. This suggestion is also appropriate because the combined impact of rate changes attributable to state and federal intercarrier compensation reform could undermine universal service and the federal fund that already supports universal service.

3. Unified Compensation Regime and A 5-Year Transition. The PaPUC also suggests that the FCC consider a unified compensation structure containing a flat fee/unlimited usage component. The PaPUC suggests this approach because it seems to better reflect modern networks while resolving the existing interstate patchwork quilt of access charges, reciprocal compensation, MTA-wide wireless calling areas, and exemptions for ESPs. However, any unified compensation structure must respect federalism and state autonomy. For these reasons, the PaPUC suggests a unified compensation structure that does not preempt the states, incorporates state efforts already underway in regard to compensation reform, and continues the current federal fund that supports universal service.

The PaPUC also suggests that any unified compensation structure recognize and address the legitimate concerns of rural carriers in thinly populated areas. The PaPUC suggests that distance and capacity are also less relevant in thinly populated areas following the recovery of initial

deployment costs. These initial deployments costs are probably higher due to their unique service territory characteristics. For these reasons, the PaPUC suggests that higher up-front deployment costs for rural carriers be considered in any compensation reform because a decline in their compensation revenues may undermine deployment efforts.

The PaPUC also recognizes that rural carriers appear concerned about the fact that their ongoing network costs are higher per customer because of long distances and few customers. The rural carriers also appear to be concerned about the fact that larger carriers, particularly the long-distance carriers, often fail to deliver urban packages or rates in areas although the result meets the rate averaging requirement of TA-96.

The PaPUC suggests, in this respect, that any federal compensation reform structure address these concerns. The PaPUC urges consideration of a federal solution that recognizes the possibility of needed revenue recovery. A federal solution, however, should also recognize and incorporate the rate impacts attributable to reform efforts already underway in the states. Those state efforts, including productivity offset reductions and resulting rate increases, revenue neutrality provisions, and limitations on municipal delivery of similar services, can be expected to limit customer choice and result in rate increases that will be augmented by any federal compensation reform.

The PaPUC also suggests that the FCC incorporate a rate minimization solution for states with populations at or below 100%, 200%, and 300% of poverty respectively. States with those populations should pay rates that total no more than a reasonable percentage e.g., 1%, 2%, or 3%, of disposable income for services impacted by compensation reform. The difference between the rates attributable to state and federal reform and any

low-income rate should be incorporated as a compensation reform cost and universal service need. The support should be portable, be derived from assessments on common carrier services, be subject to an annual true-up and, like the current federal fund, accommodate changed circumstances.

4. Funding Intercarrier Compensation Reform. The funds to support the 5-year transition should be derived primarily from modification to the current federal universal service fund. The PaPUC also suggests that modifications to this fund might necessitate an assessment on tariffed common carrier services, such as interstate special access and transit service, although there should be a true-up to recover those contributions. The PaPUC suggests that this approach could apply to carrier services for providing or delivering interstate telecommunications or telecommunications services or otherwise having their telecommunications equipment appended to the PSTN. The Commission could rely on the definitions set forth in the TA-96 in making those determinations.³ Again, however, when considering

³The PaPUC shares the general concern about the size of this fund reflected in NECA's Comment. The fund's size, however, could be reduced by several adjustments. This includes recovery of the necessary support from interstate services or revenues derived from special access, new service or, when appropriate, transit service. The tariffs and rates containing this support could be an integral part of the common carrier obligations under Title II of TA-96. The fund's size could also be reduced by offsets attributable to SLC increases and rate rebalancing to federal benchmark levels so long as they are accompanied by discernible improvements in calling services and areas. This approach could also be reconciled with the FCC's decision to classify naked DSL as exempt from unbundling and the Supreme Court's recent determination in the *Brand X* decision that cable modem service is an information service. The FCC could reconsider these classifications and decisions in the pending IP-Enabled NOPR, the underlying facilities could be severed from the information service label affixed to applications, or the FCC could expand the scope of contributors consistent with the principles set forth in Section 254(a)(1)-(3). Finally, the fund could be reduced by offsets attributable to new revenues derived from new services provided to other carriers, such as transit service, or end-users at the end of the transition period. The record in other proceedings indicates that three wireless carriers provide 95% of wholesale minutes, that special access is needed to provide many IP-enabled services such as VoIP, and that incumbent providers control over 90% of cable and central office facilities. These considerations, whatever their merits, could be taken into account when defining telecommunications service or information services and telecommunications facilities or information service facilities under TA-96 for intercarrier compensation purposes. Creative resolution of these considerations may provide additional special access revenue offsets to reduce the size of the intercarrier compensation federal fund.

the issue of funding intercarrier compensation reform, the PaPUC urges the FCC to consider the impact to consumers.

6. POI and Edges. The allocation of cost for transport between POIs at the edge of company networks appears to be an issue of importance to IXC's when they act as intermediate agents for originating and terminating calls. Under the current regime, each carrier pays the cost to transport calls to the POI. An originating carrier acquiring an IXC, however, may push their network closer to the edge of a terminating network and thereby reduces the access charge or reciprocal compensation charge paid to the terminating carrier. The PaPUC takes no position on this complex issue given a proceeding underway in Pennsylvania.⁴

7. Transit Service. The FCC's discussion of transit service indicated that transit service allows the ILECs to operate as intermediaries between two otherwise unconnected networks or as an aggregator when carrier volumes do not reach significant levels. The ICC NOPR notes that Verizon does not believe it is legally required to provide transit service although Verizon's practice is to provide transit service up to a DS-1 capacity but service above the DS-1 level must obtain special access.⁵

The PaPUC suggests that the FCC preserve the status quo during the transition period. In the alternative, the PaPUC urges the FCC to consider treating transit service as a common carrier obligation and establish transit service default rates. Parties should also be allowed to negotiate other compensation arrangements although those compensation arrangements should be available to all carriers seeking to provide identical services.

⁴Generic Investigation in re: Impact on Local Calling Carrier Compensation if a Competitive Local Exchange Carrier Defines Local Calling Areas Differently Than the Incumbent Local Exchange Carrier's Local Calling Area but consistent with Established Commission Precedent, I-00030096.

⁵ICC NOPR, fn. 347 and 379.

The PaPUC makes this alternative suggestion for several reasons. Transit service may become increasingly important given the role that peering transit service already plays in the Internet transmission market. These suggestions address the Supreme Court's recent determination in the *Brand X* decision that cable modem service, much like the FCC's determination in the naked DSL decision, is not subject to unbundling. This suggestion mitigates concerns about the market power of cable and ILEC providers that can integrate facilities and services during the 5-year transition.

Conclusion

The PaPUC respectfully urges the FCC to give these suggestions serious consideration. The suggestions urge the FCC to recognize that preemption undermines state efforts. State efforts undermine any legal conclusion that the evidence shows that states are unable or unwilling to implement carrier compensation reform.

The suggestions also reflect Pennsylvania's position in the current compensation structure. Pennsylvania is a net contributor although many rural carriers are net recipients. Pennsylvania interests could be impacted by carrier compensation reform.

The suggestions address the FCC's observations, particularly those in Paragraph 23 and in footnote 236 of the ICC NOPR, about the declining importance of distance and capacity on modern networks. The proposals also reflect the FCC's concerns about universal service impact. The proposals suggest that the federal solution analyze the combined rate impact from state and federal compensation reform efforts. It is the combined rate impact, not

just the federal rate impact that must be analyzed in order to comply with the joint state-federal obligations on universal service set forth in TA-96.

The PaPUC thanks the Commission for this opportunity to file a Reply Comment.

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